IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
March 25, 2008 Session

WASHINGTON MUTUAL BANK v. N.K.T. LAND ACQUISITIONS INC., ET AL.

Appeal from the Chancery Court for Sumner County
No. 2006C-118 Thomas E. Gray, Chancellor

No. M2007-02040-COA-R3-CV - Filed July 23, 2008

This case involves a dispute between mortgagees over priority. Both the appellant and the appellee are holders of mortgages secured by the same property; each acquired its interest from a predecessor mortgagee. The appellant contends that its mortgage has priority because of an unrecorded mortgage subordination agreement entered into between its predecessor in interest and the appellee's predecessor. The appellee contends that, because this subordination agreement was not recorded with the county register of deeds, it is invalid. On cross-motions for summary judgment, the trial court ruled that the appellee had a "right to rely" on the fact that the subordination agreement was unrecorded and held for the appellee. We conclude that, under Tennessee's recording act, a mortgage subordination agreement between mortgagees must be recorded in order to be valid on those who were not the original parties to the agreement and who lack notice of it. We, however, conclude that there is here a question as to the appellee's notice of the agreement. Accordingly, we affirm in part, reverse in part, and remand for further proceedings.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed in Part, Reversed in Part, and Remanded

WALTER C. KURTZ, SR. J., delivered the opinion of the court, in which DAVID R. FARMER and HOLLY M. KIRBY, JJ., joined.

Frank H. Reeves, Nashville, Tennessee, for the appellant, Washington Mutual Bank.

David B. Herbert, Nashville, Tennessee, for the appellee, N.K.T. Land Acquisitions, Inc.

OPINION

I

On June 30, 2000, Darryl and Brandi Stevens (the Stevenses) acquired property located at 1132 Huntington Place in Hendersonville, Tennessee by warranty deed. In order to secure an approximately $181,800.00 loan they simultaneously executed a deed of trust in favor of Columbia National, Inc. (Columbia). Shortly thereafter they obtained a second mortgage from GMAC Mortgage Corporation d/b/a Ditech.com (GMAC) so as to obtain a loan in the amount of $32,200.00.

In May 2001, the Stevenses refinanced the Columbia mortgage with a mortgage from North American Mortgage Corporation (NAMCO). Because NAMCO requested that its deed of trust occupy a first-lien position, GMAC executed a mortgage subordination agreement in favor of NAMCO. Fatefully, while the NAMCO deed of trust was recorded, the subordination agreement was not. It is this unrecorded subordination agreement that is at the heart of this appeal.

Washington Mutual Bank (Washington Mutual) subsequently acquired NAMCO's interest in January 2002. It is undisputed that Washington Mutual became the rightful holder of the note and the beneficiary of the deed of trust formerly held by NAMCO. This loan eventually became delinquent, and Washington Mutual began foreclosure proceedings in November 2005.

Meanwhile, the interest originally held by GMAC began its own migration. In November 2005, GMAC sold its loan and associated rights to Acquisitions Plus, LLC (Acquisitions Plus), a company in the business of purchasing mortgages, for $9,000.00. Acquisitions Plus then assigned the loan to its affiliate, N.K.T. Land Acquisitions, Inc. (N.K.T.). Certain specific facts related to the manner in which the acquisition from GMAC was undertaken are highly relevant to this appeal. Nancy Tedeschi is the sole owner and president of both Acquisitions Plus and N.K.T. In an affidavit submitted to the trial court, she states that, prior to the purchase by Acquisitions Plus, she personally conducted an internet search of the title records maintained by the Sumner County Register of Deeds, and her search revealed no indication of the unrecorded subordination agreement.[1]

Following this purchase from GMAC, but before the foreclosure sale, N.K.T. sent at least two letters to Wilson & Associates, PLLP (Wilson & Associates)—an Arkansas law firm that was handling Washington Mutual's foreclosure action. The first letter, which was dated January 3, 2006, includes the following passage:

> Please be advised that we have purchased the 2nd mortgage on the above referenced file from GMAC (our assignment attached). We understand your office is

[1] Washington Mutual argues, among other things, that the circumstances surrounding the purchase of this mortgage from GMAC should have placed N.K.T. on notice that the mortgage acquired was not in a first-lien position.

> proceeding with a [f]oreclosure on the first mortgage and ask that you supply our office with reinstatement figures and payoff figures.

The second, dated February 24, 2006, reads in part:

> Your office is currently representing Washington Mutual involved in foreclosing on the above mentioned property. It was recently brought to our attention that our company holds the valid 1st position on the property and in [sic] not a jr. lien as originally thought.

On March 17, 2006, Washington Mutual purchased the Stevenses' property at the foreclosure sale it had initiated. N.K.T., however, maintained that it had priority and initiated its own foreclosure proceedings. Washington Mutual filed suit against N.K.T. and GMAC in the Chancery Court for Sumner County on May 15, 2006.[2] Washington Mutual moved for summary judgment against both N.K.T. and GMAC; N.K.T. also filed its own motion for summary judgment. The trial court denied Washington Mutual's two motions and granted N.K.T.'s cross-motion by an order entered on August 22, 2007. The trial court's order states:

> 1. The motion of N.K.T. against [Washington Mutual] for dismissal of the complaint against N.K.T. is well taken in that there are no issues of material fact that there was no recording of a subordination agreement and that N.K.T. had a right to rely on this. Further, the fact that it was unrecorded by law was not notice to N.K.T.
>
> 2. The motion of [Washington Mutual] against N.K.T. is overruled for the same finding of fact and conclusion of law as mentioned in paragraph 1 above.
>
> 3. The motion of [Washington Mutual] against [GMAC] is overruled in that the Court finds that there are material issues of fact with regard to which party had a duty to record the subordination agreement and whether the subordination agreement was breached by [GMAC].[3]

The trial court thereby dismissed Washington Mutual's complaint against N.K.T. and then certified its order as a final judgment. This appeal followed. For the reasons stated herein, we affirm in part, reverse in part, and remand for further proceedings.

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[2] Washington Mutual's claim against GMAC is essentially that, should N.K.T. be found to have priority, then GMAC is liable for breach of the subordination agreement. GMAC has not participated in this case on appeal.

[3] This last aspect of the trial court's ruling is not at issue before this Court.

II

"Summary Judgment is appropriate where 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.'" *Godfrey v. Ruiz*, 90 S.W.3d 692, 695 (Tenn. 2002) (quoting Tenn. R. Civ. P. 56.04); *see Byrd v. Hall*, 847 S.W.2d 208, 211 (Tenn. 1993). A motion for summary judgment is properly granted when "both the facts and conclusions to be drawn therefrom permit a reasonable person to reach only one conclusion[.]" *Seavers v. Methodist Med. Ctr. of Oak Ridge*, 9 S.W.3d 86, 91 (Tenn. 1999) (citations omitted).

The non-moving party is entitled to have all inferences resolved in its favor and to have the evidence considered in the light most favorable to its position. *Pendleton v. Mills*, 73 S.W.3d 115, 122 (Tenn. Ct. App. 2001) (citations omitted). "When reviewing the evidence, we must determine first whether factual disputes exist. If a factual dispute exists, we must then determine whether the fact is material to the claim or defense upon which the summary judgment is predicated and whether the disputed fact creates a genuine issue for trial." *Jeffries v. Tenn. Dep't of Correction*, 108 S.W.3d 862, 869 (Tenn. Ct. App. 2002) (citations omitted). Summary judgment is proper only when the undisputed facts and the inferences reasonably drawn therefrom support the conclusion that the party seeking summary judgment should prevail as a mater of law. *Pendleton*, 73 S.W.3d at 121 (citations omitted).

A trial court's granting of summary judgment presents a question of law, and our "[r]eview is *de novo*, with no presumption of correctness afforded to the trial court's determination." *Mooney v. Sneed*, 30 S.W.3d 304, 306 (Tenn. 2000) (citing *Bain v. Wells*, 936 S.W.2d 618, 622 (Tenn. 1997)). We must therefore independently decide whether the moving party has satisfied the requirements of Tenn. R. Civ. P. 56. *Cowden v. Sovran Bank/Central South*, 816 S.W.2d 741, 744 (Tenn. 1991) (citations omitted).

III

A

"The practice of recording instruments is purely of statutory origin; and it follows that, as to what shall be registered or recorded, and the effects that the registration of any instrument or document shall have, the statutes of each jurisdiction providing therefor must be alone looked to to determine the law therein[.]" 21 Tenn. Jur. *Recording Acts* § 2 (2008) (citations omitted). The list of instruments that may be registered with the county register of deeds reads as follows:

(1) All agreements and bonds for the conveyance of real or personal estate;

(2) All powers of attorney authorizing the sale, transfer, or conveyance of real or

personal estate, or for any other purpose, or appointing an agent to transact any business whatever;

(3) All revocations of powers of attorney;

(4) All deeds for absolute conveyance of any lands, tenements or hereditaments, or any estate therein;

(5) All instruments of writing for the absolute conveyance of personal property;

(6) Copies of deeds of conveyance, with certificate of probate, of lands being in different counties in this state, certified by the register of the county where same has been first registered;

(7) Deeds of gifts of any estate, real or personal;

(8) All mortgages and deeds of trust of either real or personal property;

(9) The acknowledgment of satisfaction and discharge of mortgage, trust, and other liens, by an entry in the margin of the record thereof;

(10) All marriage settlements, contracts, or agreements;

(11) Deeds and mesne conveyances for the settlement of property, real or personal, in consideration of marriage;

(12) All other deeds of every description;

(13) Transfers or assignments of plats and certificates of survey or locations of land;

(14) All instruments in writing transferring or conveying any right of improvement, occupancy or preemption;

(15) Leases for more than three (3) years from the time of making the same, or a summary or abstract of such leases;

(16) Wills devising lands in Tennessee, or certified copies thereof, duly admitted to probate in Tennessee or in other states, together with certified copies of related probate orders;

(17) Memoranda of judgments, attachments, orders, injunctions, and other writs affecting title, use or possession of real estate;

(18) Certified copies of decrees divesting the title of land out of one person and vesting it in another;

(19) Memoranda of judgments or decrees, stating the court, date of judgment, names of parties, and amount of judgment, to bind equitable interests in land or personalty;

(20) Discharges of soldiers, sailors, marines, and naval and army officers of the United States. County registers are required, upon application of lawful holders thereof, to register such discharges without charge to the person named in the discharge, or to the holder of such discharge. Certified copies of such registered discharges issued by the register shall be legal evidence of such discharge;

(21) Certified copies of the petition in bankruptcy, with schedules omitted, of the decree of adjudication and of the order of court approving the bond of the trustee, in any bankruptcy proceeding in any court of bankruptcy of the United States;

(22) Receipts evidencing the payment of Tennessee inheritance taxes issued by the commissioner of revenue or the commissioner's authorized representative and nontaxable certificates evidencing that a sworn return for inheritance tax has been filed with the department of revenue by a duly qualified representative of the estate showing that it has been ascertained that the estate was not subject to tax, such nontaxable certificate having been issued by the commissioner or the commissioner's authorized representative;

(23) All instruments granting, transferring, pledging or assigning an interest in leases or rents arising from real property;

(24) All trust agreements or a summary or abstract of such agreements;

(25) All instruments required to be filed pursuant to § 66-19-301;

(26)(A) Any instrument that provides for any party to agree to take any action regarding any interest in real property, or not to take such action regarding any interest in real property, including, but not limited to, any agreement to or negative agreement to mortgage, pledge, assign, hypothecate, alienate, subdivide, encumber, sell, transfer, or otherwise affect the real property or any part thereof; (B) All agreements described in subdivision (a)(26)(A) that are of record as of June 14, 1999, shall be deemed validly recorded and do not need to be re-recorded to have the benefit of subdivision (a)(26)(A) and shall further be deemed to have been validly recorded upon their initial registration; and

(27) Affidavits of scrivener's error and other affidavits in furtherance of identification and title to land. The affiant in the case of any affidavit of scrivener's

> error may attach a document, including a document previously recorded with corrections made by the affiant, with the affidavit.

Tenn. Code Ann. § 66-24-101(a). "All of the instruments mentioned in [Tenn. Code Ann.] § 66-24-101 shall have effect between the parties to the same, and their heirs and representatives, without registration; but as to other persons, not having actual notice of them, only from the noting thereof for registration on the books of the register, unless otherwise expressly provided." Tenn. Code Ann. § 66-26-101. Moreover, "[a]ll of the instruments registered pursuant to [Tenn. Code Ann.] § 66-24-101 shall be notice [sic] to all the world from the time they are noted for registration . . . and shall take effect from such time." Tenn. Code Ann. § 66-26-102.

The recording act also addresses the effect of instruments eligible for registration under Tenn. Code Ann. § 66-24-101(a) that are nevertheless unrecorded: "Any instruments not so registered, or noted for registration, shall be null and void as to existing or subsequent creditors of, or bona fide purchasers from, the makers without notice." Tenn. Code Ann. § 66-26-103. In the instant case we must determine whether a mortgage subordination agreement between mortgagees is an instrument eligible for recordation under Tenn. Code Ann. § 66-24-101(a).

The trial court held that there was a "right to rely" on the absence of an entry in the records maintained by the register of deeds. N.K.T. argues this on appeal as well. Before determining whether a subordination agreement between mortgagees is one of the instruments eligible for registration under Tenn. Code Ann. § 66-24-101(a), we note that, even with respect to eligible instruments, Tennessee's recording laws do not create any abstract and absolute "right to rely" on a party's failure to record an instrument. Instead, it is usually important to consider the question of a party's notice when an instrument should have been, but was not, recorded. *Cf., e.g., In re Total Care, Inc.*, 102 B.R. 646, 650 (Bankr. W.D. Tenn. 1989) ("[A] party claiming a priority status under a subsequent mortgage who has notice of the prior mortgage[] will not gain priority status.") (construing Tenn. Code Ann. § 66-26-105).

Our Supreme Court, speaking through Justice Drowota, has described the forms of notice in detail:

> Notice is generally said to take two forms, actual or constructive. Constructive notice is notice implied or imputed by operation of law and arises as a result of the legal act of recording an instrument under a statute by which recordation has the effect of constructive notice. "It has been well said that 'constructive notice is the law's substitute for actual notice, intended to protect innocent persons who are about to engage in lawful transactions . . . .'" *Tucker v. American Aviation and General Insurance Co.*, 198 Tenn. 160, 165, 278 S.W.2d 677, 679 (1955) (citation omitted). Nevertheless, "[a]ctual notice must be given in the absence of a statute providing some means for constructive notice." 198 Tenn. at 166, 278 S.W.2d at 680 (citations omitted). Constructive notice encourages diligence in protecting one's rights and prevents fraud. If either no statute requires recordation to create constructive notice

> or a recordable instrument has not been properly recorded, then actual notice is required to estop a person.
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> While "[i]t is true that recordation creates constructive notice as distinguished from actual notice, in that ordinarily actual notice is when one sees with his eyes that something is done," *Moore v. Cole*, 200 Tenn. 43, 51, 289 S.W.2d 695, 698 (1956), another kind of notice occupying what amounts to a middle ground between constructive notice and actual notice is recognized as inquiry notice. Some authorities classify inquiry notice as a type of constructive notice, but in Tennessee, it has come to be considered as a variant of actual notice. "The words 'actual notice' do not always mean in law what in metaphysical strictness they import; they more often mean knowledge of facts and circumstances sufficiently pertinent in character to enable reasonably cautious and prudent persons to investigate and ascertain as to the ultimate facts." *Texas Co. v. Aycock*, 190 Tenn. 16, 27, 227 S.W.2d 41, 46 (1950) (citation omitted). Even a good faith failure to undertake the inquiry is no defense. *Id.*, 190 Tenn. at 28, 227 S.W.2d at 46. Thus, "[w]hatever is sufficient to put a person upon inquiry, is notice of all the facts to which that inquiry will lead, when prosecuted with reasonable diligence and good faith." *City Finance Co. v. Perry*, 195 Tenn. 81, 84, 257 S.W.2d 1, 2 (1953) (citation omitted).

Blevins v. Johnson County, 746 S.W.2d 678, 682-83 (Tenn. 1988); *see also Holiday Hospitality Franchising, Inc. v. States Resources, Inc.*, 232 S.W.3d 41, 49 (Tenn. Ct. App. 2006).

The law provides that, if an instrument is listed in Tenn. Code Ann. § 66-24-101(a) and it goes unrecorded, then it "shall be null and void as to existing or subsequent creditors of, or bona fide purchasers from, the makers without notice." Tenn. Code Ann. § 66-26-103. Thus, not all purchasers are affected equally by a failure to record one of the instruments included in the statutory list. A purchaser without notice of an unrecorded instrument, if it is one listed in Tenn. Code Ann. § 66-24-101(a), can be expected take his interest unencumbered by the unregistered instrument. A purchaser with notice, however, is not so fortunate, and in most, if not all, circumstances will be subjected to the effects of the instrument—even though it was not recorded—provided he had notice of it. *See* 66 Am. Jur. 2d *Records and Recording Laws* § 165 (2008) ("It is an elementary rule in the construction of most recording laws that notice of an unrecorded instrument is equivalent to the recording of it, with respect to the person having such notice."); 21 Tenn. Jur. *Recording Acts* § 14 (2008) ("Actual knowledge renders constructive notice by registration immaterial.") (citation omitted).

B

Our task is to ascertain whether a mortgage subordination agreement between mortgagees is an instrument covered by Tenn. Code Ann. § 66-24-101(a). It is undisputed that the words "subordination agreement" do not appear in the list contained in Tenn. Code Ann. § 66-24-101(a). N.K.T. argues, though, that a subordination agreement is covered by items (1), (8), (12), (14), and

(26)(A) of this list. Washington Mutual contends that none of these is applicable to such an agreement.

We have previously examined a similar question on registration. In *Green v. Hooton*, 624 S.W.2d 898 (Tenn. Ct. App. 1981), the Court considered whether a private trust agreement was within the ambit of the Tennessee recording act. We there stated:

> From an inspection of the list included in [Tenn. Code Ann. § 66-24-101], we conclude that the kinds of instruments which relate to real property all involve a conveyance or transfer of some kind from the record owner.

Id. at 900. The Court then concluded that a "private trust entered into by a settlor and a trustee does not fit in this category of instruments." *Id.*

In effect the Court in *Green* reached this conclusion by applying a variation of the principle of *noscitur a sociis*[4] in conjunction with a review of the purposes for the recording act.[5] *See Green*, 624 S.W.2d at 900. Washington Mutual argues that we should apply this same judicial gloss to each of the items of the statutory list cited by N.K.T. The problem for this argument is that the statutory list has been amended since *Green* was decided. For example, the phrase "trust agreements or a summary or abstract of such agreements" has been added to the listing of instruments that may be recorded. Tenn. Code Ann. § 66-24-101(a)(24); *see In re Brown*, 182 B.R. 778, 783 (Bankr. E.D. Tenn. 1995) (discussing addition to the statutory list). Of vital importance for the present discussion is the fact that (26)(A) was also added subsequent to *Green*.[6] It requires the registration of:

> Any instrument that provides for any party to agree to take any action regarding any interest in real property, or not to take such action regarding any interest in real property, including, but not limited to, any agreement to or negative agreement to mortgage, pledge, assign, hypothecate, alienate, subdivide, encumber, sell, transfer, or otherwise affect the real property or any part thereof[.]

Tenn. Code Ann. § 66-24-101(a)(26)(A).

Even assuming, without deciding, that we should adhere to the *Green* court's reading of the provisions that were at issue in that case and thus should read each of them to extend only to

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[4] "A canon of construction holding that the meaning of an unclear word or phrase should be determined by the words immediately surrounding it." *Black's Law Dictionary* 1087 (8th ed. 2004) (*noscitur a sociis*).

[5] Those purposes are as follows: "(1) to preserve the muniments of title; (2) to perpetuate the evidence of their valid execution; (3) to give the community notice of the changes in the ownership of property; and (4) to prevent frauds both upon the bargainor and upon his creditors." *Green*, 624 S.W.2d at 900 (quoting *Gibson's Suits in Chancery* § 87(6) (5th ed. 1955)); *see* William H. Inman, *Gibson's Suits in Chancery* § 101(F) (7th ed. 1988) (containing same language).

[6] This was undertaken by the 101st General Assembly in 1999. *See* 1999 Tenn. Pub. Acts 364 (H.B. 157).

"conveyance[s] or transfer[s] of some kind from the record owner[s]," *Green*, 624 S.W.2d at 900, we cannot casually assume that the language added by the legislature after *Green* would necessarily also extend only to such transactions. *See Maury County ex rel. Maury County Regional Hosp. v. Tenn. State Bd. of Equalization*, 117 S.W.3d 779, 786 (Tenn. Ct. App. 2003) ("[A]s a general rule of statutory construction, a change in the language of the statute indicates that a departure from the old language was intended.") (quoting *Lavin v. Jordan*, 16 S.W.3d 362, 369 (Tenn. 2000)); *cf. Ki v. State*, 78 S.W.3d 876, 879 (Tenn. 2002) ("[C]ourts must presume that the legislature is aware of . . . the decisions of the courts when enacting legislation.") (citing *State v. Levandowski*, 955 S.W.2d 603, 604 (Tenn. 1997)).

We, however, need not concern ourselves with the task of evaluating each of the various individual items of Tenn. Code Ann. § 66-24-101(a). The language of (26)(A) creates what might be considered a "catchall" provision and is the part of the statutory list that is most likely to reach a mortgage subordination agreement between mortgagees. One might at first be tempted to conclude that we should, much as we did in *Green*, look at the entire list of recordable instruments to find the meaning of (26)(A). If we were to do so, this would then naturally implicate the other items appearing before it and thereby necessitate a determination as to whether they are to be understood as indicated by the opinion in *Green*. Such a contextual examination is unnecessary, though, where the statutory language at issue is unambiguous. *See Freeman v. Marco Transp. Co.*, 27 S.W.3d 909, 911-12 (Tenn. 2000) ("[C]ourts are restricted to the 'natural and ordinary' meaning of a statute unless an ambiguity necessitates resorting elsewhere to ascertain legislative intent.") (citing *Austin v. Memphis Publ'g Co.*, 655 S.W.2d 146, 149 (Tenn. 1983)); *see also Greenery Rehabilitation Group, Inc. v. Hammon*, 150 F.3d 226, 231 (2d Cir. 1998) ("If the statutory terms are unambiguous, our review generally ends and the statute is construed according to the plain meaning of its words.") (citation omitted); *cf. Ali v. Federal Bureau of Prisons*, __ U.S. __, __, 128 S.Ct. 831, 840, 169 L.Ed.2d 680, 691-92 (2008) ("[W]e do not woodenly apply limiting principles every time Congress includes a specific example along with a general phrase.") (citation omitted).

While (26)(A) is arguably complex, we do not find it to be ambiguous. Whatever may be said of the items preceding it, (26)(A)—by its very terms—moves beyond the more limited realm of agreements entered into by record owners and includes a much broader class of instruments entered into by "any party." And, in light of the myriad of rights that accompany a mortgage or deed of trust, *see generally* 19 Tenn. Jur. *Mortgages and Deeds of Trust* § 30 (2008), we must consider a mortgage to be an "interest in real property." Therefore, we conclude that an agreement between mortgagees subordinating a mortgage (and thus the rights attendant to that mortgage) would qualify as an "instrument that provides for any party to agree to take any action regarding any interest in real property, or not to take such action regarding any interest in real property[.]" Tenn. Code Ann. § 66-24-101(a)(26)(A).

Based upon a straightforward reading of its language, we do not believe that the legislature intended (26)(A) to be limited by the prior holding of *Green* and to thereby have it apply only to transactions by or conveyances from record owners. Rather, we believe (26)(A) was meant to encompass many kinds of instruments that might not otherwise be covered. It is irrelevant then

whether any, all, or none of the items preceding (26)(A) should be read so as to reach only transactions by or conveyances from record owners. Cabining (26)(A) in the manner urged by Washington Mutual would be contrary to the otherwise broad scope manifested by its plain language.

Although we do not consider it to be controlling, we do note that apparently in practice mortgage subordination agreements are treated as recordable instruments in Tennessee.[7] *See* 4 Jack W. Robinson, Jr., William T. Ramsey & Aubrey B. Harwell, Jr., *Tennessee Forms*, 1957-58 (2d ed. 1991) (Form No. 9-408) ("Deed of Trust Subordination Agreement") ("This document should be recorded in the Register's Office in which the subject deeds of trust are filed."). Even Washington Mutual concedes that such agreements are typically recorded in most jurisdictions and further concedes that the *Restatement (Third) of Property* similarly counsels their recordation. *See Restatement (Third) of Property: Mortgages* § 7.7, illus. 1 (1997) ("Without recording, the risk exists that a bona fide purchaser who lacks notice of the subordination will deal with the mortgagee in the belief that the mortgage continues to have priority, and that the recording act will permit such a person to treat the subordination as a nullity.").

In summary, we conclude that the holder of a mortgage does possess an interest in the subject property, and an agreement affecting the priority of the mortgagee's claim must be said to affect this interest. Thus, a mortgage subordination agreement between mortgagees is covered by the recording act and has to be recorded in order to be valid against subsequent purchasers who acquire their interests without notice of the agreement's existence. Because we conclude that (26)(A) covers a mortgage subordination agreement between mortgagees, we need not consider whether such an agreement might also be covered by any of the other provisions of Tenn. Code Ann. § 66-24-101(a) that are cited and relied upon by N.K.T.

C

Determining that the recording act would call for the recordation of a mortgage subordination agreement does not, however, end our analysis. Instead, as discussed above, the next question is whether N.K.T. had actual or inquiry notice of the subordination agreement originally entered into between GMAC and NAMCO. The final order entered by the trial court in this case does not address the issue of what notice N.K.T. might have had, but N.K.T. maintains before this Court—and apparently did so below as well—that it did not have any notice of this agreement.

The two letters sent in the first part of 2006 from N.K.T. to Wilson & Associates constitute a considerable hurdle for N.K.T.'s contention that there is no evidence to suggest actual notice of such an agreement. Indeed, the letters alone are sufficient to raise a material question of fact as to

[7] N.K.T. filed with the trial court an affidavit from the Sumner County Register of Deeds stating that she does record mortgage subordination agreements.

the existence of actual notice by N.K.T. at the time the loan was purchased.[8] Although an affidavit from Ms. Tedeschi states that N.K.T. did not have notice of the subordination agreement, N.K.T.'s 2006 correspondence suggests otherwise. What precisely N.K.T. "originally thought" (to use the words employed in N.K.T.'s second letter) is not clear from reading these letters, but it is certainly possible for them to be understood as indicating that the unrecorded subordination agreement had been discovered prior to the time of the acquisition from GMAC.[9] While these two letters might be explained away at trial, any such explanation could not be accepted by the court on summary judgment. *See Exxon Corp. v. Raetzer*, 533 S.W.2d 842, 846 (Tex. Civ. App. 1976) ("Ordinarily, notice is a question of fact which is to be determined by the trier of facts; it becomes a question of law only when there is no room for ordinary minds to differ as to the proper conclusion to be drawn from the evidence.") (citing *O'Ferral v. Coolidge*, 228 S.W.2d 146 (Tex. 1950)). Thus, upon remand, the finder of fact will have to determine whether there was actual notice of the mortgage's subordination.

Likewise, the evidence also leaves open the possibility that N.K.T. was on inquiry notice as well. Even beyond the two letters mentioned above, the trial court was presented with competing affidavits as to whether the facts surrounding the purchase from GMAC should have signaled that the mortgage being sold was subordinated. Washington Mutual argues that, as a matter of law, N.K.T. was on inquiry notice because the sale of a mortgage in a first-lien position at the discount received on the purchase in question here would have been commercially unreasonable. N.K.T. disagrees and points to its own evidence, including an affidavit from Ms. Tedeschi in which she avers that this acquisition was consistent with past purchases of first position mortgages. We conclude that this evidence presents a factual dispute. *See generally* 58 Am. Jur. 2d *Notice* § 15 (2008) ("The question whether the circumstances are sufficient to give rise to a duty of further inquiry is ordinarily one of fact, frequently fraught with appreciable difficulty, and always determinable in the light of the circumstances of the particular case."). Inquiry notice, though, would not charge N.K.T. with knowledge of all the facts that might have conceivably been discovered. Instead, notice would only be of "the facts to which that inquiry [would] lead, when prosecuted with reasonable diligence and good faith." *Blevins*, 746 S.W.2d at 683 (quoting *City Finance Co. v. Perry*, 195 Tenn. 81, 84, 257 S.W.2d 1, 2 (1953)). While subtle, this is an important distinction.

Upon remand, then, the finder of fact must determine whether N.K.T. was on notice, be it actual or inquiry, of the fact that the mortgage it was acquiring had been subordinated by a prior agreement. If N.K.T. was on inquiry notice only, then the finder of fact must determine what a reasonable inquiry would have revealed. A reasonable inquiry, however, would not necessarily be

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[8] We do not mean to imply, however, that these two letters are the only evidence that may be considered at trial on the question of actual notice.

[9] Because it was not raised by the parties to this appeal, we do not address the significance of what Acquisitions Plus may have known prior to its purchase of the loan from GMAC versus what N.K.T. may have known prior to accepting the transfer from Acquisitions Plus. Presumably, the status of Ms. Tedeschi as the sole owner of both entities renders any such distinction inconsequential. For our purposes we consider the knowledge of Acquisitions Plus to be the same as the knowledge of N.K.T., and we will refer only to N.K.T. in our discussion of this point.

limited to what would have been discovered by examining the records of the county's register of deeds. Inquiry notice is not merely constructive notice by another name. It covers those facts that would have been discovered under the circumstances by reasonably diligent actors regardless of whether that information is formally recorded. *See Clay Properties, Inc. v. Washington Post Co.*, 604 A.2d 890, 898-99 (D.C. 1992) ("[C]ontrary to the suggestion of the trial court, a title search alone cannot always completely exonerate a purchaser; the doctrine of inquiry notice may require more."); *see also In re Hill*, 71 B.R. 252, 256 (Bankr. E.D. Tenn. 1986) ("The duty to inquire . . . takes in information with which a diligent purchaser 'ought to become acquainted,' such as recitals in the chain of title, whether or not recorded.") (quoting Toxley Sewell, *The Tennessee Recording System*, 50 Tenn. L. Rev. 1, 46 (1982)); *cf. Franklin Bank, N.A. v. Bowling*, 74 P.3d 308, 313 n.11 (Colo. 2003) ("Unlike constructive notice, inquiry notice depends on extrinsic factual inquiry. For these purposes, we limit constructive notice to notice imputed solely through operation of the recording acts."). If the facts here would have reasonably suggested further inquiry and such an inquiry, when undertaken in good faith and with reasonable diligence, would have revealed the subordination of the mortgage to be acquired, then N.K.T. cannot avoid the effects of the subordination agreement simply by arguing that it would not have been found in the records of the register of deeds.

Accordingly, because a mortgage subordination agreement entered into between mortgagees is an instrument encompassed by Tenn. Code Ann. § 66-24-101(a)(26)(A), the failure to record this instrument would be dispositive if N.K.T. did not have notice of it—but the evidence here does not indisputably lead to the conclusion that N.K.T. did lack such notice. If N.K.T. had either actual or inquiry notice of this agreement, then it cannot avail itself of the fact that the agreement was unrecorded. We, however, disagree with Washington Mutual's argument that the facts here establish N.K.T.'s notice as a matter of law; thus the trial court properly denied Washington Mutual's motion below. Instead, the evidence reveals disputes as to material questions of fact concerning both actual and inquiry notice which must be resolved by the finder of fact at trial.

IV

For the reasons expressed above, the decision of the trial court denying Washington Mutual's motion for summary judgment is affirmed, the decision granting summary judgment to N.K.T. is reversed, and this case is remanded for further proceedings consistent with this opinion. Costs of this appeal are taxed equally to Washington Mutual, as well as its surety, and N.K.T. for which execution may issue if necessary.

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WALTER C. KURTZ, SENIOR JUDGE